(1) (4)

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR(C.G)

CRIMINAL APPEAL NO. 549/ 2006

APPELLANT (In- Jail) : 1) Raj @ Tanvir S/o Sharif Musalman Aged about 20 years,

2) Raju @ Rakesh S/o Rambadan Dwivedi Aged about 20 years, Both are R/o. Mohala, PS- Mohala, Distt Rajnandgaon(C.G.)

3198/06 Filed on 27/7/06 by Shri S C Verma Advocate 27/7/06 R to D.R. (J)

VERSUS

RESPONDENT : State of Chhattisgarh Through Police Station Mohala, Distt- Rajnandgaon (C.G.)

Criminal Appeal under/section 374 (2) of the Code of Criminal Procedure

(35)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 549/2006

Raj @ Tanveer and another

Vs.

State of Chhattisgarh

JUDGMENT

Post for 08.01.2007

Sd/-
Sunil Kumar Sinha
Judge

see and signed
S. Sinha (Nov)
8/11/07

(36)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 549/2006

Raj @ Tanveer and another

Vs.

State of Chhattisgarh

Shri S.C.Verma, counsel for the appellants.

Shri M.P.S. Bhatia, Panel Lawyer, for the State.

JUDGMENT
(08.01.2007)

Sunil Kumar Sinha, J.

(1) This appeal is directed against the judgment of conviction and order of sentence dated 22.6.2006 passed by the Special Judge (S.C. and S.T. [Prevention of Atrocities] Act), Rajnandgaon in Special Case No.12/2005 whereby the appellants have been convicted under sections 376(2)(g) and 341 of IPC and sentenced to undergo R.I. for 10 years and fine of Rs.500/-, in default of payment of fine, to undergo further S.I. for two months and S.I. for 1 month respectively.

(2) The case of the prosecution is that the prosecutrix namely Radhika Gond (P.W.1) and her cousin Ishwari, aged about 5 years, both belong to Scheduled Tribe. On 22.2.2006, they had gone to village Aktakanhar from their village on a Bicycle. When they were returning back in the evening at about 4.30 p.m., these appellants and one Vikki @ Vikas, a juvenile offender, met them on the way and they stopped them near Babamar Nala. The prosecutrix was taken by the appellant no.1 to a nearby place and her clothes (Jeans and Top) were removed and thereafter, the appellant no.1 committed sexual

intercourse against her. The allegations are that the other two co-accused were keeping watch on the persons passing through the Road and they had facilitated appellant no.1 to commit rape upon the prosecutrix. The further allegations are that thereafter those two accused persons also started moving towards the prosecutrix and on seeing them, the prosecutrix, thinking that they would also commit sexual intercourse against her, ran away from the place of occurrence towards the road on underwear and a piece of cloth (*Chuneri)* only, which she could have put on when she left the place. It is alleged that on the road, she met with two persons namely Manak Gond (P.W.16) and Jyot Kunwar Bai (P.W.5), who were previously known to her. She narrated the story to them. After hearing the story, they went to the forest area and they brought Ishwari with them. They also saw three accused persons running away from that place. It is alleged that thereafter, the prosecutrix also narrated the story to one Teacher of village Mohala namely Tula Ram (P.W12) and and Dilip Singne (P.W.13), who had also reached to the place of occurrence and thereafter she lodged the report in police station vide Ex.P-1. On the said report, the investigation commenced and the site plan of the place of occurrence was prepared by the S.H.O. vide Ex.P-3 and the prosecutrix was medically examined by the Doctor on 23.2.2005 vide Ex.P-17. During the course of investigation, appellant Raju @ Rajesh was put to test identification parade on 26.2.2005, conducted by the Sub-Divisional Magistrate Mohala namely H.K. Pawar (P.W.11), in which he was duly identified by the prosecutrix and a memorandam to this effect, vide Ex.P.6 ,was prepared. A memorandum of co-accused,Juvenile Offender Vikki @ Vikas,u/s 27 of the Evidence was also recorded on 23.2.2005 vide Ex.P-12, on which, the Bicycle of the

prosecutrix was recovered on 23.2.2005 vide Ex.P-13.from the place indicated by him which was a cement pipe under the culvert (Pul) of Babamar Nala. A caste certificate (Ex.P-15) of the prosecutrix was also seized and after completion of investigation, a charge sheet u/ss. 376(2)(g), 341 IPC and section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the Special Act) was filed against the appellants before the Judicial Magistrate, First Class, Ambagarh Chowki, Distt. Rajnandgaon. Since the co-accused Vikki @ Vikas was a juvenile, a separate charge sheet was filed against him. The J.M.F.C. committed this case to the Special Court on 6.4.2005.

(3) The learned Special Judge framed charges u/s 376(2)(g) and 341 IPC and section 3(1)(xii) and 3(2)(v) of the Special Act to which the appellants denied. On conclusion of trial, the Special Judge held the appellants guilty of the offence punishable u/s 341 and 376(2)(g) of IPC and sentenced them as aforementioned. However, they were acquitted of the charges framed u/s 3(1)(xii) and 3(2)(v) of the Special Act. It is against this conviction and sentence, awarded to the appellants, they have filed this appeal.

(4) The Special Court based the conviction upon the testimony of the prosecutrix (P.W.1) holding it to be corroborated by Jyot Kuwar Bai (P.W.5) and Manak Gond (P.W.16), further corroborated by Tula Ram (P.W.12) and Dilip Kumar Singh (P.W.13).

(5) Learned counsel for the appellant argued that the testimony of the prosecutrix is not trustworthy and the entire evidence of the prosecutrix would show that either she was not subjected to sexual intercourse on the said date or if the sexual intercourse was done, it

was with her consent. He submitted that the trial court ignored that part of evidence completely, which goes to show that appellant no.1 was previously known to her and both were in love and there was an admission that prior to this incident also, the prosecutrix had physical relations with appellant no.1 for 2-3 times. He submitted that in view of the above evidence of prosecutrix, the evidence of other witnesses would have no weightage and the conviction vitiates.

(6) On the other hand, learned State Counsel opposed the arguments and supported the judgment of conviction and order of sentence.

(7) I have heard learned counsel for the parties at length and have also perused the records of the case.

(8) It comes in the evidence of the prosecutrix Radhika Bai (P.W.1) that at the time of return from the village Aktakanhar at about 4.30 – 5 p.m., she was stopped on the way by the present appellants and the juvenile offender and there after, she was taken by the appellant no.1 to a distant place from the road. Her sister Ishwari (cousin) was detained by the other two co-accused persons. She states vide para no.2 that appellant no.1 undressed her by removing her T-Shirt (top) and Jeans. When it was done like this, she started running away towards the road but ultimately she had hidden herself beside the Nala because she was not wearing the clothes. She further stated that after this, appellant no.1 got her laid down on the ground and committed sexual intercourse against her and then she ran away from the spot. She states that there after these two witnesses namely Jyot Kunwar Bai (P.W.5) and Manak Gond (P.W.16) met her on the way. It appears vide para 4 of the evidence of

prosecutrix, that she was declared hostile by the prosecution on certain grounds and the prosecution had taken permission to cross examine her, which was allowed, and she was cross-examined at length by the public prosecutor. In her further cross examination, she has admitted vide para 22 that appellant no.1 was previously known to her as she used to visit his shop for obtaining Cassettes. She has further admitted vide para 23 of her cross examination that prior to the incident, once appellant no.1 had taken her, from the company of her friend namely Banvasa, towards a field leaving Banvasa on road, and in the field, they loved each other and they had returned to the road after an hour, where Banvasa was waiting. In para 26 of her cross examination, she has specifically admitted that she was in love with appellant no.1. since much prior to the date of incident. She has also admitted that she had physical relations with him for 3 times. She has also admitted that on the fateful day, near Babamar Nala, both had not slept as husband and wife. She has stated that on that day, she was only involved in love affairs (*Pyar Mohabat*) with appellant no.1 during which, appellant no.1 had kissed her. The prosecutrix also stated in para 6 of her evidence that two other co-accused persons had also come to the place of occurrence thereafter, and if she would not have run away from the said place, they would have committed sexual intercourse against her. So far as evidence of Jyot Kunwar Bai (P.W.5) is concerned she had stated that the prosecutrix had met her near Babamar Nala because she was previously known to her. At that time she was wearing underwear and she had put on *Chuneri*, a piece of cloth on her. On being asked, she replied that when she was coming to village Mohla three boys met her and one of them has committed rape upon her. She also told

about her sister (cousin). By that time, many persons gathered there and they brought the girl (cousin of the prosecutrix) from the place indicated by her and thereafter, they boarded a Bus for reaching to village Mohla. Almost similar evidence has been given by Manak Gond (P.W.16). It is stated that he was also accompanying Jyot Kunwar Bai (P.W.5) when the prosecutrix had met her. He has corroborated the story given by Smt.Jyot Kunwar. The other witness namely Tulara (P.W.12) has been declared hostile as he has partly supported the story narrated by Jyot Kunwar Bai (P.W.5) and Manak Gond (P.W.16). Dilip Kumar Singne (P.W. 13) has also been declared hostile as he has also not fully supported the case of prosecution.

(9) Admittedly, the prosecutrix was aged about 19 years on the date of incident and there is no dispute about it. She has admitted in her evidence that appellant no.1 was previously known to her and she used to visit the cassette shop of this appellant frequently and she had been taken by this appellant for so many times and for three times, she had physical relations with him. It also comes in her statement that she was in love with appellant no.1 and according to the cross examination, on the fateful day, this appellant had kissed her and on that date, they had not slept as husband and wife. She also admitted that her Jeans and T-shirt were removed by the appellant no.1 and when she saw that the other two co-accused are coming to her, she ran away from that place with her underwear and *Chuneri* with an apprehension that they will commit sexual intercourse against her. On this evidence, it is apparent that either the prosecutrix was not subjected to sexual intercourse on the said date, or if she was subjected to it, the same was done with her consent. Otherwise in absence of any allegations regarding

threatening or forcible constraint, there was no reason with the prosecutrix not to resist at the time of removing Jeans and Top and also at the time of kissing etc., or even at the time of commission of alleged sexual intercourse by appellant no.1. This conduct of the prosecutrix coupled with the history of her love with appellant no.1 further coupled with her admission for having physical relations with appellant no.1 on 3 earlier occasions supports the theory of consent, which the trial Court has completely lost sight of. It appears that the trial Court was very much impressed by the evidence of P.W.5, P.W.12, P.W.13 & P.W.16 that they had seen the prosecutrix half-naked with underwear and Chuneri only. Perhaps the learned trial Judge took notice of the fact as to what was the reason that the prosecutrix had run away from the place of occurrence in such a condition and she narrated the story to these witnesses ? It would have been a good point for replacing the theory of consent, but here the prosecutrix herself admits that when she saw that the two other co-accused persons are also coming to her, which according to her was a time after completion of the sexual intercourse by appellant no.1, it cropped up in her mind that they will also commit sexual intercourse with her and for this reason, she ran away from the place of occurrence even without wearing her clothes. If this was the reason for running away from the spot, it suggests that she was not willing to have sexual intercourses against the other two co-accused persons and she ran away for the same and in light of this evidence, the circumstances of running away of the prosecutrix from the place of occurrence without wearing clothes and there after meeting with the other witnesses and disclosing the story to them is fully explained and it makes no difference, so far as the theory of consent is concerned.

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(10) In the facts and circumstances of this case, the evidence of prosecutrix does not inspire confidence of this court so as to hold that she was subjected to forcible sexual intercourse by appellant no.1, Rather her conduct and admission regarding her previous relations with appellant no.1 and the description of the incident clearly go to show that a possibility of her being a consenting party cannot be fully ruled out in this case, and I hold it accordingly.

(11) For the foregoing reasons, it is held that the prosecution could not establish its case beyond reasonable doubt and the conviction of the appellants u/s 376(2)(g) and 341 IPC deserve to be set aside. Accordingly, the appeal is allowed. The conviction and sentence awarded to the appellants are set aside. The appellants are acquitted of the charges framed u/s 376(2)(g) and 341 of IPC. It is stated that the appellants are in jail. They be set at liberty, forthwith, if not required in any other case.

Sd/-
Sunil Kumar Sinha
Judge

Rao